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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 474

H. GORDON HOWARD, *Petitioner,*

vs.

THE INTERNATIONAL TRUST COMPANY, Special Administrator of the Estate of Mary Steinhart, Deceased, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR RESPONDENT IN OPPOSITION

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November, 1959

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Supreme Court of Colorado is reported in 338 P.2d 689 and is printed in Appendix A of the petition for writ of certiorari. The findings and judgment of the District Court in and for the City and County of Denver are printed in Appendix B of the petition for writ of certiorari.

JURISDICTION

The Supreme Court of Colorado entered its opinion on April 27, 1959 and denied a petition for rehearing on May 18, 1959 (Petitioner's Brief, Appendix F, p.31a). An order extending until October 15, 1959 the time for filing a petition for writ of certiorari was signed by Mr. Justice Brennan on August 13, 1959.

Petitioner seeks to invoke the jurisdiction of this Court under the 14th Amendment to the Constitution of the United States and Title 28 United States Code, Section 1257.

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a writ of certiorari to the Supreme Court of Colorado because of an alleged deprivation of due process of law under the Constitution of the United States when such federal question was not raised in the pleadings prior to trial, at trial, or in pursuance of a writ of error to the Colorado Supreme Court, but only upon petition for rehearing addressed to said Colorado court.

2. Whether any rights of alleged beneficiaries under a voluntary declaration of trust with respect to certain real property were adjudicated without due process of law in violation of the 14th Amendment to the Constitution of the United States, where such beneficiaries were not parties in this case, and where an oral motion to intervene on behalf of such beneficiaries was made on the day the trial commenced and denied by the trial court for failure to comply with state procedural requirements, and where the judgment of the trial court in an admittedly in personam action merely required the settlor-trustee to execute a quitclaim deed covering the disputed real property in favor of the plaintiff.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies solely upon the provisions of the 14th Amendment to the Constitution of the United States. No

statute, either state or federal, is alleged to be involved in this case (Petitioner's Brief, p. 4).

SUPPLEMENTAL STATEMENT OF THE CASE

The statement of the case contained in the brief of petitioner is substantially correct and is adopted by respondent, with the exception of the following three points:

1. Petitioner's statement of the case conveys an erroneous impression by stating that the trial court "ordered the petitioner to reconvey the Illinois farm land to the respondent." (Petitioner's Brief, p.6) The exact order of the trial court was "that the defendant herein execute forthwith a quitclaim deed to the said Illinois property in favor of the plaintiff." (Petitioner's Brief, Appendix B, p.21a). The significance of the precise wording of the trial court's order will be discussed hereinafter.

2. Petitioner's statement of the case conveys an erroneous impression by inferring that a federal question was raised at an early stage of the proceedings herein (Petitioner's Brief, pp. 5, 6, and 7). The first time that petitioner alleged the existence of a federal question was in his petition for a rehearing before the Supreme Court of Colorado, as will be shown hereinafter.

3. On July 8, 1959 an order was entered in this action by the District Court in and for the City and County of Denver, State of Colorado, substituting The First National Bank of Denver, as Special Administrator of the Estate of Mary Steinhart, deceased, for and in place of The International Trust Company, Special Administrator of the Estate of Mary Steinhart, deceased, as plaintiff herein. Petitioner H. Gordon Howard, appearing pro se, was present in court at the time such order of substitution was entered. Hence the proper party respondent herein is The First National Bank of Denver, as Special Administrator of the Estate of Mary Steinhart, deceased.

REASONS FOR DENYING CERTIORARI

1. *Petitioner failed to allege the existence of a federal question, either verbally or in writing, until the filing of his petition for a rehearing before the Supreme Court of Colorado.*

2. *No federal question is involved in this case.*

ARGUMENT IN SUPPORT OF REASONS FOR DENYING CERTIORARI

Petitioner failed to allege the existence of a federal question, either verbally or in writing, until the filing of his petition for a rehearing before the Supreme Court of Colorado.

The summons and complaint below were served upon petitioner on August 6, 1956; the trial was held commencing May 1, 1957 and the judgment of the trial court against petitioner was entered on May 9, 1957 (Petitioner's Brief, Appendix B, p.21a). On the same day that the summons and complaint were served upon him, petitioner executed the so-called voluntary declaration of trust in favor of his wife and child (Petitioner's Brief, Appendix A, p.4a). It is the rights of the beneficiaries under this instrument which were allegedly violated by both the Denver District Court and the Supreme Court of Colorado and which form the sole basis for the petition for a writ of certiorari.

During the more than eight months between the commencement of this action and the trial, no attempt was made by petitioner, as trustee or otherwise, to bring the alleged interest of the trust beneficiaries to the attention of the trial court. On December 14, 1956 petitioner filed an answer and counterclaim to the complaint in which he sought to rescind the transaction with plaintiff and to recover the consideration allegedly paid plaintiff. In neither his answer nor his counterclaim did petitioner mention the interest of any other person in the controversy (Petitioner's Brief, Appendix A, p.9a).

On the day the trial commenced petitioner made an oral motion to intervene on behalf of his wife and child. The trial court denied the motion because petitioner had failed to comply with Rule 24, Colorado Rules of Civil Procedure, pertaining to intervention (Petitioner's Brief, Appendix C, p.24a). At the time this motion was made and denied petitioner did not make an objection based on the 14th Amendment to the Constitution of the United States, or on any other federal ground, nor did he do so at any other time during the trial.

Following the trial petitioner moved to vacate the judgment against him for lack of jurisdiction. The motion to vacate the judgment may be searched in vain for any reference to the Constitution or statutes of the United States.

On his appeal to the Supreme Court of Colorado petitioner assigned sixteen grounds of error. The specific assignments of error which are said to raise a federal question are set forth in full on page 7 of petitioner's brief. They contain no reference to either the Constitution or the statutes of the United States.

After the Supreme Court of Colorado affirmed the judgment of the trial court, petitioner, in his petition for a rehearing, for the first time alleged the existence of a federal question (Petitioner's Brief, Appendix E). It is axiomatic that a party who would seek relief in this court for a claimed violation by a state court of his rights under the Constitution or statutes of the United States must have raised the federal question at an early stage of the proceedings to afford the state courts an opportunity of passing upon it. *Edelman vs. People of State of California*, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387; *People of the State of New York ex rel. Cohn vs. Graves*, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 666. A party who attempts to urge a federal question for the first time in a petition for rehearing before

a state court is too late. *Radio Station WOW vs. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092; *Rooker vs. Fidelity Trust Co.*, 261 U.S. 114, 43 S.Ct. 288, 6 L.Ed. 556.

No federal question is involved in this case.

The single point upon which the petition for a writ of certiorari is premised is that the courts of Colorado determined the property rights of parties who were not before the court (Petitioner's Brief, p.9). While admitting that this is an in personam action directed against petitioner alone (Petitioner's Brief, p.10), petitioner nevertheless alleges that in some way the rights of the claimed beneficiaries under the trust instrument were adjudicated (Petitioner's Brief, p.10).

Such an argument ignores the fact that the judgment only required petitioner to execute a *quitclaim deed* in favor of plaintiff (Petitioner's Brief, Appendix B, p.21a). It further ignores the fact that plaintiff, who died after the entry of judgment by the trial court, only held a life estate in the property in dispute here, and hence any interest claimed in such property by either petitioner or his wife and child has long since been extinguished.

In any event, the opinion of the Supreme Court of Colorado on this point is dispositive of petitioner's contention. It is as follows:

> "The action being in personam directed only to Howard, and no relief of any kind being asserted or sought against the beneficiaries of the alleged trust or any other persons who might have or claim an interest in the Illinois property, no determination of their rights is or could be had in this action." (Petitioner's Brief, Appendix A, p.9a).

CONCLUSION

No federal question was raised by petitioner until after this controversy had been heard and determined by both the Denver District Court and the Supreme Court of Colorado.

More importantly, no federal question has in fact been presented to either of the Colorado courts or to this court. For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November, 1959.